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SUPREME COURT, U. S.

FILED
DEC 28 1973

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 73-500

RAYMOND L. NEWTON
and
GERMAINE C. NEWTON,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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INDEX

	PAGE
QUESTION PRESENTED.....	1
ARGUMENT.....	1-6
CONCLUSION.....	6-7
CERTIFICATE OF SERVICE...	7

TABLE OF AUTHORITIES

CASES

California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 484 (1970)..... 2

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)..... 1, 2

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)..... 6

Davis v. United States, 411 U.S. 233, 250, 93 S.Ct. 1577, 1587, 36 L.Ed.2d 216 (1973)..... 2

Dutton v. Evans, 400 U.S. 74, 80, 91 S.Ct. 210, 215, 27 L.Ed.2d 213 (1973)..... 2

Harrington v. California, 395 U.S. 25, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969)..... 6

TABLE OF AUTHORITIES CONTINUED

CASES — PAGE

Lynch v. New York, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934).....

Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895)..... 2

RULES

Fla.R.Cr.P., Rule 3.190(j) (1973)... 5

Rule 3.190(L) Florida Rules of Criminal Procedure (1971)..... 2, 3, 4

Rule 19(1) Supreme Court Rules.... 6

QUESTION PRESENTED

WHETHER A SUBSTANTIAL FEDERAL QUESTION HAS BEEN DEMONSTRATED?

ARGUMENT

Petitioners allege that various rulings of the trial court in regard to their attempts to impeach three prosecution witnesses served to deprive the petitioners of a fair trial.

Their reliance upon this Court's recent decision in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), is totally misplaced. In that case, Chambers' efforts to develop an exculpatory defense were frustrated by the cumulative impact of the trial court's several evidentiary rulings. Id., at fn 3. These adverse rulings occurred during Chambers' affirmative attempt to present his defense. He was not allowed to impeach an adverse witness because of the Mississippi "voucher" rule, and was not allowed to introduce testimony of three other witnesses on the ground of hearsay.

However, the rulings complained of in the instant case occurred during the presentation of the State's case, and were only with regard to certain limited questions sought to be asked on cross-examination and did not occur during the course of the

presentation of affirmative defenses by the petitioners. There was no such wholesale exclusion of testimony as occurred in Chambers.

The first ruling complained of was in regard to the trial court's refusal to allow an ex parte affidavit by the witness, Green, whose former testimony had been read to the jury, to be admitted into evidence to impeach his testimony. Relying upon Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), the court below affirmed the ruling of the trial court. (See Petition, App. 3-4.)

Mattox, supra, is still vital law, having been cited by this Court in numerous recent cases. See, e.g. Davis v. United States, 411 U.S. 233, 250, 93 S.Ct. 1577, 1587, 36 L.Ed.2d 216 (1973); Chambers v. Mississippi, supra, 410 U.S. at 295, 93 S.Ct. at 1046; Dutton v. Evans, 400 U.S. 74, 80, 91 S.Ct. 210, 215, 27 L.Ed.2d 213 (1973); California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 484 (1970).

Petitioners have attempted to distinguish the facts of the instant case from those of Mattox, supra. They point to the fact that the witness in Mattox was dead, while the witness in the case sub judice repudiated his own former testimony by ex parte affidavit prior to leaving the jurisdiction of the State. The court below noted this distinction and found that the facts in the instant case were even stronger in support of the reasons for the exclusion of such document. This was because the petitioners could have utilized Rule 3.190(L), Florida Rules of

Criminal Procedure (1971) to preserve the witness' testimony. Petitioners' counsel was aware that the witness was departing the State's jurisdiction, while the prosecution had no knowledge of such facts. (See Petition, App. 5)

The State rule relied upon by the court below provided, in part:

> (L) Motion to Take Deposition to Perpetuate Testimony.
>
> (1) At any time after the filing of an indictment, information, or affidavit upon which a defendant is to be tried, if he shall satisfy the court by his oath in writing, or by the affidavits of credible persons, that the testimony of an absent person is material and necessary to his defense, and that such witness resides beyond the territorial jurisdiction of the court or is so sick and infirm that with diligence his attendance cannot be procured at the trial, the court upon the proper application of the accused, or his attorney, shall order that a commission be issued to take the deposition of such witnesses to be used in the trial. If the application is made within ten days prior to the trial date the court may in the exercise of sound discretion deny such application.

(2) If a defendant desires to perpetuate the testimony of a witness living in or out of the state, whose testimony is material and necessary to his defense, the same proceedings shall be followed as set forth in sub-section (1) hereof; with the exception, however, that the testimony of such witness be taken before an official court reporter, transcribed by him, and filed in the trial court.

. . .

(4) Except as otherwise provided, the rules governing the taking and filing of oral depositions, the objections thereto, the issuing, execution and return of the commission, and the opening of the depositions in civil cases shall be observed in criminal cases.

(5) No deposition shall be used or read in evidence when the attendance of the witnesses can be procured, and if it shall appear to the court that any person whose deposition has been taken has absented himself by the procurement, inducement, or threats of the accused, or of any person on his behalf, such depositions shall not be read in evidence.

Parenthetically, it is noted that, at the time of petitioners' trial, such perpetuation of testimony was available only to defendants. The Rule has now been changed to allow the State to take depositions to perpetuate testimony as well. See Fla.R.Cr.P., Rule 3.190(j)(1973).

It is obvious that ruling of the court below could have been based solely upon the failure of the petitioners to follow State procedural rules. Therefore, this issue is not one properly within the jurisdiction of this Honorable Court. Where the state judgment rests on two grounds, one of which involves a federal question and one of which involves an adequate State ground, the latter of which would be sufficient to sustain the judgment, and it is not clear upon which of the two grounds the judgment was based, this Court should refuse to consider the question. Lynch v. New York, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934).

The second ruling complained of was the trial court's refusal to allow petitioners to ask two witnesses why their testimony at the second trial was less damaging than the testimony they had given at the first trial which had ended in mistrial. The court below found such contention of error to be "without merit." (See Petition, App. 6) However, the court ruled alternatively on this issue as well, finding that the trial court's ruling constituted harmless error, at most. (See Petition, App. 6-7)

The testimony sought to be impeached went to the question of first degree murder.

The court found that the jury disregarded such testimony in reaching the verdict of second degree murder. There were five eyewitnesses to the shooting incident. The error complained of here was with regard to rulings on attempted cross-examination of only two of them. It is obvious that the court below properly relied upon federal standards in determining the existence of harmless error. Harrington v. California, 395 U.S. 25, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Petitioners have failed to demonstrate, pursuant to Rule 19(1) of the Supreme Court Rules, that "special and important reasons" exist for this Court to assume jurisdiction to review the factual bases for the lower court's reliance upon previous decisions by this Honorable Court.

CONCLUSION

The existence of a federal question is debatable. Even if a federal question has been presented, it is unsubstantial. Therefore, this Court should deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Brief of Respondent in Opposition was served upon HENRY R. CARR, Esquire, 1440 N. W. 14th Avenue, Suite 2, Miami, Florida, 33125, this ___ day of December, 1973.

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